

The evidence fails to establish that claimant's back was injured as a result of an accident that arose out of and in the course of employment with the respondent. Therefore, the Preliminary Hearing Order of Administrative Law Judge Alvin E. Witwer, dated November 7, 1994, is affirmed in all respects.

Claimant alleges that she injured her low back on May 18, 1994, when she bent over to remove a carton of sour cream from a lower shelf of a refrigerator while working for the respondent. Claimant sought emergency medical treatment for this alleged injury the next day, May 19, 1994, when she was taken by ambulance to Shawnee Mission Medical Center. On May 21, 1994, she was seen by orthopedic surgeon Richard E. Whitehead. An MRI was performed at his request, but he apparently provided no further treatment after early June 1994 because of insurance coverage questions. Eventually claimant was treated at the University of Kansas Medical Center by an orthopedic surgeon, Dr. Glenn Amundson, who performed surgery on July 20, 1994 for a right side L4-5 disc herniation and nerve root compression at L5.

However, the medical records do not relate the claimant's low back problems to her work until Dr. Amundson's involvement. The May 19, 1994 emergency room records refer to claimant's history of ongoing, recently increasing low back pain, with no history of recent trauma or injury. Dr. Whitehead's chart entry of May 21, 1994, indicates that the onset of the present problem was May 17, "when pt. squatted down to pick up her stockings at home." At the Preliminary Hearing claimant testified that she did not work May 17, 1994, because that morning she had bent down to pick up socks, resulting in low back pain. The claimant's testimony and the often contradictory testimony of the fact witnesses are not sufficient to sustain claimant's burden of proving that the injury was work related rather than related to the incident at home.

The claimant has the burden to establish the right to compensation benefits and to prove the various conditions upon which such right depends. See K.S.A. 44-501(a). In the present case, the Appeals Board finds the claimant has failed to meet this burden. After reviewing the whole record, including the numerous depositions of the fact witnesses and the arguments contained in the briefs of the parties, the Appeals Board finds the claimant has failed to prove that it is more probably true than not that she suffered an accidental injury in the performance of her work activities on May 18, 1994. Thus, the Appeals Board affirms the Order of the Administrative Law Judge that denied claimant's benefits for the alleged accident date of May 18, 1994.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge Alvin E. Witwer, dated November 7, 1994, should be, and hereby is, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of June 1995.

BOARD MEMBER PRO TEM

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Overland Park, KS
J. Paul Maurin III, Kansas City, KS
Todd Myers, Overland Park, KS
Alvin E. Witwer, Administrative Law Judge
George Gomez, Director